

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

FLORIDA CABLE
TELECOMMUNICATIONS ASSOCIATION,
INC., COX COMMUNICATIONS GULF
COAST, L.L.C., et. al.

Complainants,

v.

GULF POWER COMPANY,

Respondent.

DOCKET FILE COPY ORIGINAL

E.B. Docket No. 04-381

GULF POWER'S SUPPLEMENTAL RESPONSES TO COMPLAINANTS'
SECOND REQUEST FOR PRODUCTION OF DOCUMENTS

Gulf Power Company ("Gulf Power") supplements its responses to complainants' Second Request for Production, in accordance with the Presiding Judge's September 21, 2005 Second Discovery Order, as follows:

GENERAL RESPONSES AND OBJECTIONS

1. Gulf Power adopts and incorporates its responses and objections to complainants' second set of request for production of documents, as if fully set forth herein.
2. Gulf Power adopts and incorporates its response to complainants' second motion to compel as if fully set forth herein.
3. The responses and objections herein supplement and/or amend Gulf Power's August 26, 2005 responses and objections.

SPECIFIC RESPONSES AND OBJECTIONS

1. Produce, and specify by Bates number, all documents referring to any instance, from 1998 through the present, in which Gulf Power was unable to accommodate additional attachments, either by third parties or by Gulf Power itself, on poles already containing Complainants' attachments.

ORIGINAL RESPONSE:

The documents which would reflect instances where Gulf Power could not accommodate an additional attacher on a pole already occupied by complainants would be Gulf Power's make-ready documents, made available for inspection and copying during the May 27-28, 2005 document review. None of these documents have been Bates labeled.

SUPPLEMENTAL RESPONSE:

The requested documents are the make ready work orders made available at Gulf Power's Engineering & Construction offices, organized chronologically by year, during the May 27-28, 2005 document review (and which remain available for review with reasonable notice and coordination). These documents were produced "as they are kept in the usual course of business." Fed. R. Civ. P. 34(b); see also Allianz Ins. Co. v. Surface Specialties, Inc., 2005 WL 44534, *3 (D. Kan. Jan. 7, 2005) ("[A]bsent some indication the requested documents were produced as they are kept in the usual course of business, the party responding to the requests is required to identify the particular documents or to organize and label them to correspond to the requests."). Make-ready work orders are maintained almost exclusively at the Engineering & Construction offices within Gulf Power's service territory. Since this request seeks "all documents referring to any instance from 1998 through the present, in which Gulf Power was unable to accommodate additional attachments . . . on poles already containing Complainants' attachments," this request calls for a very large number of documents spread throughout the Engineering & Construction offices. Complainants themselves have a better understanding, geographically speaking, of where they are attached and when they attached. Thus, by way of example, if Comcast (which operates principally in the Panama City area) wished to inspect the make ready work orders which referred to instances in which Gulf Power was unable to accommodate additional attachments on pole where Comcast already was attached, Comcast should look specifically at the make-ready files (organized chronologically by year) which are "kept in the usual course of business" in the Panama City Engineering & Construction office.

2. Produce, and specify by Bates number, all documents referring to the actual costs that Gulf Power has incurred annually because of Complainants' attachments (including per-pole costs and aggregate costs), as reflected in its accounting books or records of expenses, from 1998 through the present.

ORIGINAL RESPONSE:

Gulf Power objects to this request on the grounds that it is vague and ambiguous. Subject to and without waiving these objections, the documents which would reflect costs incurred as a result of complainants' attachments are the make-ready work orders produced during the May 27-28, 2005 document review.

SUPPLEMENTAL RESPONSE:

This request, as Gulf Power understands it, seeks production of make ready work orders for the make ready work done at the request of complainants themselves. Gulf Power made these make ready work orders available at Gulf Power's Engineering & Construction offices, organized chronologically by year, during the May 27-28, 2005 document review (and which remain available for review with reasonable notice and coordination). These documents were produced "as they are kept in the usual course of business." Fed. R. Civ. P. 34(b); see also Allianz Ins. Co. v. Surface Specialties, Inc., 2005 WL 44534, *3 (D. Kan. Jan. 7, 2005) ("[A]bsent some indication the requested documents were produced as they are kept in the usual course of business, the party responding to the requests is required to identify the particular documents or to organize and label them to correspond to the requests."). Make-ready work orders are maintained almost exclusively at the Engineering & Construction offices within Gulf Power's service territory, as make ready is handled at the local level. Thus, if by way of example, Cox wanted to see make ready work orders done at its request (and did not want to look at its own files), Cox could identify by permit number a particular file in a particular year at a particular Engineering & Construction office. This does not involve looking for the proverbial "needle in a haystack." To the extent complainants are seeking information about the aggregate cost of make-ready performed at their request, this information could be ascertained from the make-ready costs set forth on their permits. Complainants are given a copy of the permit, but these permits also were produced "as they are kept in the usual course of business" on the cart of documents, organized by attacher, made available in the first floor Gulf Power conference room during the May 27-28 document review.

4. Produce, and specify by Bates number, all documents referring to Gulf Power poles that have been changed out from 1998 to the present at Complainants' request, including documents referring to compensation received by Gulf Power from Complainants for such change-outs.

ORIGINAL RESPONSE:

Gulf Power objects to this request on the grounds that compensation for change-outs and make-ready are irrelevant to the hearing issues. Subject to and without waiving this objection, all of the requested documents relating to change-outs and make-ready were made available for inspection and copying during the May 27-28, 2005 document review. With reasonable notice and coordination, Gulf Power will again make those documents available.

SUPPLEMENTAL RESPONSE:

The requested documents are the make ready work orders, specifically reflecting change outs, made available at Gulf Power's Engineering & Construction offices, organized chronologically by year, during the May 27-28, 2005 document review (and which remain available for review with reasonable notice and coordination). These documents

were produced "as they are kept in the usual course of business." Fed. R. Civ. P. 34(b); see also Allianz Ins. Co. v. Surface Specialties, Inc., 2005 WL 44534, *3 (D. Kan. Jan. 7, 2005) ("[A]bsent some indication the requested documents were produced as they are kept in the usual course of business, the party responding to the requests is required to identify the particular documents or to organize and label them to correspond to the requests."). The face sheet of any particular make-ready order will note whether the make-ready requires a change-out.

5. Produce, and specify by Bates number, all documents referring to Gulf Power poles containing Complainants' attachments that have been changed out from 1998 to the present at the request of cable television attachers other than Complainants, including documents referring to compensation received by Gulf Power from such entities for such change-outs.

ORIGINAL RESPONSE:

Gulf Power objects to this request on the grounds that compensation for change-outs and make-ready are irrelevant to the hearing issues. Subject to and without waiving this objection, all of the requested documents relating to change-outs and make-ready were made available for inspection and copying during the May 27-28, 2005 document review. With reasonable notice and coordination, Gulf Power will again make those documents available.

SUPPLEMENTAL RESPONSE:

The requested documents are the make ready work orders, specifically reflecting change outs, made available at Gulf Power's Engineering & Construction offices, organized chronologically by year, during the May 27-28, 2005 document review (and which remain available for review with reasonable notice and coordination). These documents were produced "as they are kept in the usual course of business." Fed. R. Civ. P. 34(b); see also Allianz Ins. Co. v. Surface Specialties, Inc., 2005 WL 44534, *3 (D. Kan. Jan. 7, 2005) ("[A]bsent some indication the requested documents were produced as they are kept in the usual course of business, the party responding to the requests is required to identify the particular documents or to organize and label them to correspond to the requests."). The face sheet of any particular make-ready order will note whether the make-ready requires a change-out.

6. Produce, and specify by Bates number, all documents referring to make-ready work (other than change-outs) performed at Complainants' request on Gulf Power poles from 1998 to the present, including documents referring to compensation received by Gulf Power from Complainants for such make-ready work.

ORIGINAL RESPONSE:

Gulf Power objects to this request on the grounds that compensation for change-outs and make-ready are irrelevant to the hearing issues. Subject to and without waiving this objection, all of the requested documents relating to change-outs and make-ready were made available for inspection and copying during the May 27-28, 2005 document review. With reasonable notice and coordination, Gulf Power will again make those documents available.

SUPPLEMENTAL RESPONSE:

The requested documents are the make ready work orders, specifically reflecting change outs, made available at Gulf Power's Engineering & Construction offices, organized chronologically by year, during the May 27-28, 2005 document review (and which remain available for review with reasonable notice and coordination). These documents were produced "as they are kept in the usual course of business." Fed. R. Civ. P. 34(b); see also Allianz Ins. Co. v. Surface Specialties, Inc., 2005 WL 44534, *3 (D. Kan. Jan. 7, 2005) ("[A]bsent some indication the requested documents were produced as they are kept in the usual course of business, the party responding to the requests is required to identify the particular documents or to organize and label them to correspond to the requests."). The face sheet on each make-ready order will set forth the type of make-ready work performed (rearrangement, change-out, etc.).

7. Produce, and specify by Bates number, all documents referring to make-ready work (other than change-outs) performed at the request of cable television attachers other than Complainants on Gulf Power poles containing Complainants' attachments from 1998 to the present, including documents referring to compensation received by Gulf Power from such cable television attachers for such make-ready work.

ORIGINAL RESPONSE:

Gulf Power objects to this request on the grounds that compensation for change-outs and make-ready are irrelevant to the hearing issues. Subject to and without waiving this objection, all of the requested documents relating to change-outs and make-ready were made available for inspection and copying during the May 27-28, 2005 document review. With reasonable notice and coordination, Gulf Power will again make those documents available.

SUPPLEMENTAL RESPONSE:

The requested documents are the make ready work orders, specifically reflecting change outs, made available at Gulf Power's Engineering & Construction offices, organized chronologically by year, during the May 27-28, 2005 document review (and which remain available for review with reasonable notice and coordination). These documents were produced "as they are kept in the usual course of business." Fed. R. Civ. P. 34(b);

see also Allianz Ins. Co. v. Surface Specialties, Inc., 2005 WL 44534, *3 (D. Kan. Jan. 7, 2005) (“[A]bsent some indication the requested documents were produced as they are kept in the usual course of business, the party responding to the requests is required to identify the particular documents or to organize and label them to correspond to the requests.”). The face sheet on each make-ready order will set forth the type of make-ready work performed (rearrangement, change-out, etc.).

12. In light of the Presiding Judge’s ruling that “this hearing is limited to ‘reasonable compensation’ from rates charged for Complainants’ CATV attachments” and his order excluding as irrelevant evidence “relating to non-CATV attachments,” produce, and specify by Bates number, all documents which Gulf Power relied or relies upon in making its contention, in its Description of Evidence, that there is an “unregulated market for pole space,” to the extent that that contention applies to CATV attachments.

ORIGINAL RESPONSE:

Gulf Power does not interpret the Discovery Order to mean that evidence regarding what other attachers pay for the same space occupied by complainants will be excluded as irrelevant. This would be legally incorrect, and at odds with Gulf Power’s burden to demonstrate a more appropriate alternative rate. Gulf Power relied, in part, upon the attachment agreements and billing information for attachers paying more than complainants. These documents are within Bates range Gulf Power 00826 - 2309, and other such documents were made available at the May 27-28, 2005 document review.

SUPPLEMENTAL RESPONSE:

Gulf Power is unclear as to what it is being ordered to do. In its original response, Gulf Power identified by Bates range the documents requested (and already copied and produced). Gulf Power’s reference to “other such documents” which “were made available at the May 27-28, 2005 document review” was a specific reference to the cart of documents made available in the first floor conference room of Gulf Power’s headquarters, organized by attacher, which contained (among other things) attachment agreements, permits and billing information. To wit, this is where complainants spent approximately one-and-a-half days reviewing documents. These documents were produced “as they are kept in the usual course of business” with the exception that multiple file drawers in other places at Gulf Power’s headquarters were consolidated on one cart for the convenience of complainants.

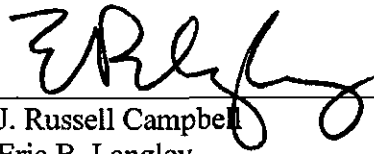
15. Produce, and specify by Bates number, all documents, including maps, diagrams, or schematics, which existed prior to Gulf Power’s retention of its consultant Osmose in February 2005, that depict the specific Gulf Power poles containing Complainants’ attachments that Gulf Power contends were or have been at “full capacity.”

ORIGINAL RESPONSE:

Gulf Power made all such documents available during the May 27-28, 2005 document review. Certain of these documents were among those copied for complainants following the document review, at complainants' request.

SUPPLEMENTAL RESPONSE:

Gulf Power is unclear as to what it is being ordered to produce. The only "maps, diagrams, or schematics" in Gulf Power's possession already have been produced. As Gulf Power clarified in its response to complainants' second motion to compel, the documents made available at the May 27-28 document review which are responsive to this request were the 1996 and 2001 pole count documents (boxes were specifically identified when produced). Gulf Power further clarified in its response to complainants' second motion to compel, "[i]f complainants are looking for maps which designate specific poles at 'full capacity,' there are no such maps." (Gulf Power's Response, p. 6).¹



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¹ Gulf Power's contemporaneously-filed motion to reconsider seeks reconsideration of the portion of the Second Discovery Order addressing Request No. 15 which requires Gulf Power to create new documents (in the form of "circled" or "color coded" maps).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Supplemental Responses To Complainants' Second Set Of Request For Production Of Documents has been served upon the following by Electronic Mail and by United States Mail on this the 30th day of September, 2005:

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